

Advocacy Urges the U.S. Fish and Wildlife Service's to Consider the Costs to Small Businesses from Designating Critical Habitat for the Southwestern Willow Flycatcher

On March 29, 2005, the Office of Advocacy (Advocacy) sent a letter to the U.S. Fish and Wildlife Service (FWS), in response to its proposed rule, *Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher* (69 Fed. Reg. 60706, Oct. 12, 2004). Advocacy urged the FWS to analyze the potential for the proposed designation to harm small business farmers and ranchers, as well as to consider excluding areas vital to small businesses from the final designation. Also, Advocacy expressed concern with FWS' consultation practices in Arizona and its recent delays in releasing its estimates for how much its rules would cost the public. A complete copy of Advocacy's letter to the FWS may be accessed at <http://www.sba.gov/advo/laws/comments/>.

- The ESA requires FWS to designate critical habitat for endangered and threatened species to provide those species extra protection. A user of land that falls within a critical habitat designation requires a Federal clearance or permit for the use of that land and must undergo more vigorous review by FWS. FWS may require costly mitigation efforts by land users within critical habitat designations, or the agency may ultimately deny the permit and forbid the land use.
- Small farmers and cattle growers have informed Advocacy that they face significant burdens from the designation of critical habitat for the Southwestern Willow Flycatcher. Farmers along river banks believe they could be forced to consult with FWS prior to using legal pest control measures or clearing brush. Cattle growers believe that the U.S. Forest Service intends to deny grazing permits along rivers designated as critical habitat, claiming that birds which scavenge after cattle could also harm the flycatcher.
- Advocacy urged FWS to consider small business costs in a regulatory impact analysis, consistent with the Regulatory Flexibility Act. Also, Advocacy encouraged FWS to consider specific regulatory alternatives which would reduce or eliminate small business impacts.
- Advocacy asked FWS to refrain from requiring consultation and mitigation from small cattle growers seeking grazing permits for land that is not inhabited by the flycatcher. Advocacy believes that there is currently insufficient legal basis for regulating small cattle growers under those circumstances.
- Advocacy recommended that FWS release its estimates of the small business costs likely to be imposed by its rules at the same time the agency proposes them for the public's comments. Also, Advocacy asserted that the Endangered Species Act and FWS' own rules require the agency to provide at least 60 days for the public to comment on the economic data the agency relies on for any final critical habitat rule.

For more information, visit Advocacy's Web page at: <http://www.sba.gov/advo>, or contact assistant chief counsel Michael See by email at Michael.See@sba.gov or by phone at (202) 619-0312.